No. 1818

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON-ALASKA BANK (a corporation),
Plaintiff in Error,

vs.

C. J. STEWART and C. M. SHAW,
Defendants in Error.

Upon Writ of Error to the United States District Court for the District of Alaska, Division Number Four.

BRIEF FOR DEFENDANTS IN ERROR.

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BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

By this writ of error, plaintiff in error, defendant below, is seeking the reversal of a judgment against it for $3,686.02, being the amount of usurious interest collected by it on six promissory notes. The facts in the case are as follows:

On September 22, 1909, C. J. Stewart, one of the plaintiffs below, filed his complaint, consisting of six causes of action, for the recovery from the defendant

Bank of $3,686.02. In his complaint Stewart alleged the making and giving of six separate promissory notes to the defendant Bank, upon each of which he was charged and paid the Bank interest at the rate of two per cent. per month. Each of the six causes of action counted upon interest paid upon a separate note. The prayer was for judgment for double the amount of the unlawful interest paid on each note (Tr. pp. 1-9).

To this complaint the Bank demurred, specifying as its grounds of demurrer to each cause of action that it did not state facts sufficient to constitute a cause of action, and that the Court had no jurisdiction of the subject of the action (Tr. pp. 10-11). The demurrer was overruled (Tr. pp. 11-12), and the Bank thereupon filed its answer. The only defense to each of the six causes of action was that, before the commencement of the action, Stewart had assigned the subject matter and cause of action, set forth in each cause of action, to one C. M. Shaw, who, it was averred, was the real party in interest (Tr pp. 12-15).

Upon the filing of this answer, Stewart made a motion and filed an affidavit. that he be permitted to amend his complaint, by making Shaw a party plaintiff, and by adding to each cause of action an allegation that the charging, collecting and receiving of the interest by the Bank was done in Alaska and with full knowledge that the same was illegal and wrongful, and also by adding an allegation that, before the commencement of the action, he had made a general assignment of all his property to Shaw, so as to enable Shaw to collect

the assets for the purpose of paying Stewart's creditors and of paying any remaining surplus to Stewart. The affidavit of Stewart recited that he was in doubt, whether or not in law the general assignment to Shaw passed to him the rights of action for usury set up in the complaint, but that Shaw was willing to be made a party to the suit, and that thereby the possibility, that defendant be subjected to any other suit on account of the usury complained of, would be removed (Tr. pp. 15-18). Shaw also filed an affidavit, in which he stated that if, by reason of Stewart's assignment to him, he had any interest in the causes of action for usury, he was willing to be made a party plaintiff *and to be concluded by this action* (Tr. pp. 18, 19). The Bank filed written objections to Stewart's application for leave to amend (Tr. p. 20), but they were overruled and Stewart was allowed to file an amended complaint (Tr. p. 21). This he did by making Shaw a party plaintiff, by adding to each cause of action an allegation to the effect that the charging, collecting and receiving of the interest was done by the Bank in the District of Alaska, and with knowledge of its illegality and wrongfulness and by also adding to each cause of action an allegation of the assignment to Shaw (Tr. pp. 22-34).

The Bank demurred to each cause of action of the amended complaint upon the grounds that each failed to state facts sufficient to constitute a cause of action, and that several causes of action had been improperly united (Tr. pp. 35-36). This demurrer was overruled

(Tr. pp. 36-37), and the Bank thereupon filed its answer to the amended complaint. It made no denial of any allegation of the amended complaint, but simply averred as a defense to each cause of action that neither Stewart nor Shaw "are the real parties in interest in " this action, but that the West Coast Grocery Com- " pany, a corporation, * * * is the real party in in- " terest"; that some time prior to the filing of the amended complaint Stewart assigned his right, title, claim and interest in each cause of action to the Grocery Company; that Stewart is insolvent and that his assets, "together with the total amount claimed in the " amended complaint will not pay all his debts and lia- " bilities to the said West Coast Grocery Company, and " to his other creditors", and that Stewart has no interest whatever in the causes of action; it is further averred as a defense that the action has been brought on behalf of the Grocery Company "in the name of " plaintiffs to avoid the defense that said cause of " action is not assignable and with the distinct under- " standing and agreement between plaintiffs and said " West Coast Grocery Company that said West Coast " Grocery Company would pay all costs and expenses " and attorney's fees", and further that the plaintiffs should not be held in any way responsible for costs and attorney's fees and that the Grocery Company had employed the attorney prosecuting the suit and had advanced all necessary costs and expenses for its prosecution and that it was the exclusive beneficiary in each cause of action and the only and real party in interest therein; that the plaintiffs had no interest whatever in

the subject matter of any one of the causes of action nor any interest in or to any judgment that might be recovered against the defendant, but that "the same and " the whole thereof is for the benefit of said West Coast " Grocery Company" (Tr. pp. 37-47).

Upon the filing of this answer the plaintiffs made a motion that the same be stricken from the record; that they have judgment as prayed for in their amended complaint, for the reason that the answer was sham and frivolous and raised no issue and was not interposed in good faith, but solely for the purpose of delay (Tr. pp 47- 48). In support of this motion Stewart filed an affidavit, in which he recited the proceedings in the suit up to the filing of the answer to the amended complaint, and further stated that the amended answer was filed so as to delay the recovery of a judgment, inasmuch as the defendant was contemplating the sale of all of its property and realized that, if a judgment were recovered against it, after the sale of its property, the collection of the judgment would be worthless (Tr. pp. 48-52). The Bank moved to strike this affidavit from the files (Tr. p. 53). Thereafter upon the hearing of the motion, to strike the answer from the files and for judgment, the Bank asked to amend its answer, by averring that Shaw "is and at all times mentioned in said " amended complaint was the agent and employee of " said West Coast Grocery Company". The Court denied this motion; also denied the motion of the Bank to strike Stewart's affidavit from the files and granted the motion of the plaintiffs to strike the Bank's amended answer from the files and for judgment (Tr. pp.

54, 56). Thereupon judgment in favor of the plaintiffs was duly made and entered in accordance with the prayer of the amended complaint (Tr. pp. 56, 57). The Bank filed a petition for writ of error and its assignment of errors and perfected its writ of error to this Court (Tr. pp. 57, 68).

Argument.

FIRST: IN VIEW OF THE FACT THAT AN AMENDED COMPLAINT WAS FILED, THE RULING OF THE COURT WITH REFERENCE TO THE ORIGINAL COMPLAINT BECAME IMMATERIAL.

The first error assigned is that the trial Court erred in overruling defendant's demurrer to the original complaint. An amended complaint was filed, however, and, therefore, the question, whether or not the Court erred in overruling the demurrer to the original complaint is immaterial. It is well settled that, when a pleading is amended, the amended pleading supersedes the original pleading, and an order of a trial Court, in overruling a demurrer to the original pleading, will not be reviewed. In such a case the sufficiency of the amended pleading alone, will be considered. See,

Wells v. Applegate, 12 Ore. 208;
Walsh v. McKeen, 75 Cal. 519;
Rooney v. Gray Bros., 145 Cal. 753.

In the case last cited the Supreme Court of California said:

> "If this second amended complaint was not vulnerable to the attack the defendants made upon it

> by demurrer or motion to strike out, then it is of no moment whether the Court erred in its rulings on the demurrer or motion to the previous pleadings of the plaintiff or not; the sufficiency of this last pleading is alone in question."

SECOND: THE TRIAL COURT DID NOT ERR IN PERMITTING THE ORIGINAL COMPLAINT TO BE AMENDED SO AS TO JOIN SHAW AS A PARTY PLAINTIFF.

Plaintiff in error complains of the action of the trial Court in permitting the joinder of Shaw as a co-plaintiff with Stewart.

It is contended that the causes of action set forth in the original and amended complaints were assignable; that the allegations of the amended complaint show that the assignment by Stewart, the sole plaintiff named in the original complaint, to Shaw, had divested Stewart of all interest in the causes of action, before the original complaint was filed, and that, therefore, it was error for the trial Court to have permitted the amendment, joining Shaw as a party plaintiff.

But, counsel err in their contention. The amended complaint does not show that Stewart, by the assignment, had parted with *all* of his interest in the causes of action. On the contrary, it is alleged, in paragraph five of each of the counts in the amended complaint (Tr. pp. 23, 25, 27, 29, 31 and 33), that the assignment to Shaw by Stewart, before the commencement of the action, of his various properties, including the causes of action for the statutory penalties, was made "for

" the purpose of enabling him, the said C. M. Shaw, to " collect the assets and pay the debts of the said C. J. " Stewart and to pay the surplus, if any, to the said " C. J. Stewart". It thus appears that, by the assignment to Shaw, Stewart *did not part* with *all* of his interest in his various properties, including the causes of action sued on, but parted only with so much of his interest therein as might be necessary to pay his debts, *the surplus to be repaid to him.* According to the allegations of the amended complaint, therefore, Shaw was interested in so much of the recovery sought, as might be necessary for the payment of Stewart's debts, while Stewart was interested in such recovery to the extent of the balance remaining.

It is *suggested*, in the brief of plaintiff in error, that it appears from the averments of defendant's answer that Stewart had no interest whatsoever in the recovery sought, but, of course, in determining the propriety of the action of the trial Court in allowing the amendment, the answer of the defendant, filed *after* the amendment was allowed, will not be considered.

1. *Stewart and Shaw were both interested in the recovery sought by the action at the time of its commencement; they could, therefore, have been properly joined as plaintiffs in the original complaint, and, this being so, it was, of course, proper, by amendment, to have permitted Shaw to be added as a party plaintiff.*

In the case of *Royal Insurance Co. v. Miller,* 199 U. S. 353, the Supreme Court of the United States held that, under statutes similar to Section 25 of the Code of Civil

Procedure of Alaska, and providing that actions shall be prosecuted in the names of the real parties in interest, it is proper to allow a new party to be brought in, by amendment, who has an interest in the *recovery sought* by the action, although his interest in such recovery is subordinate to the interest of the original plaintiff therein. In that case, which was on writ of error to the United States District Court for Porto Rico, a mortgagor had effected certain insurance upon the mortgaged property; this insurance, under the Spanish law, passed to the mortgagee without any actual assignment. A loss having occurred, Miller, the representative of the mortgagee, brought suit upon the policy against the insurance company. A third party, one Lucas Amadeo, claiming an interest in the proceeds of the policy under assignments from certain assignees of the mortgagor, was permitted, by amendment, to become a party plaintiff to the action and to allege that his right to participate in the recovery sought was subordinate to the right of the mortgagee. The action of the District Court, in permitting the addition, by amendment, of such third party as a plaintiff was assigned as error in the Supreme Court. The Supreme Court, however, overruled the assignment and held that the allowance of the amendment was entirely proper, saying:

> "The claims of both parties depended upon the contract of insurance. There was no inherent antagonism between the two claims, since the amendment making Lucas Amadeo a party expressly alleged that his rights in and to the policy were subordinate to those of Miller, special master. We

consider the provisions of the code in procedure above quoted as analogous to the provision of the codes of a number of the States of the Union, by which an action is required to be brought *in the name of the real parties in interest*, and it is allowable to join as parties plaintiff those *having an interest in the recovery sought.* Fireman's Ins. Co. v. Oregon R. R. Co., 45 Oregon 53; Fairbanks v. S. F. & N. Pac. Ry. Co., 115 California 579; Home Ins. Co. v. Gilman, 112 Indiana 7; Winne v. Niagara Fire Ins. Co., 91 New York 185, 192; Pratt v. Radford, 52 Wisconsin 114."

This decision, we submit, is of itself sufficient authority for the proposition that, under statutes, providing that actions must be prosecuted *in the name of the real parties in interest,* it is proper to add, by amendment, a party plaintiff who has an interest *in the recovery sought,* subordinate to that of the original plaintiff.

2. *Even if it appeared, however, from the averments of the amended complaint that, at the time the original complaint was filed, Stewart had parted with all of his interest in the causes of action by his assignment to Shaw, still the allowance of the amendment, adding Shaw as a party plaintiff, will not justify a reversal.*

(a) Plaintiff in error cites certain State cases and especially, *Dubbers v. Goux,* 51 Cal. 153, saying that those cases hold that "one who has a cause of action " cannot be brought in and substituted as the sole plain- " tiff in the place and stead of one who has not, and " did not have, at the time the action was commenced, " any cause of action" (Brief, p. 28).

The purpose of these cases, we presume, is to show that, assuming that Stewart had no interest in the causes of action sued on, at the time of the commencement of the action, then, just as under the rule in these cases, it would have been error to have allowed the *substitution* of Shaw for Stewart as sole plaintiff in the action, so it was error to have permitted the *joinder* of Shaw as a co-plaintiff with Stewart.

But, the rule here invoked, even if predicated upon actual facts, is unavailing to the plaintiff in error in this Court. It is the well settled doctrine of the Federal Courts that when

> "a suit is brought in the name of a wrong party, *the real party in interest,* entitled to sue upon the cause of action declared on, may be *substituted* as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff, has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff."

McDonald v. Nebraska (C. C. A. 8th Circuit), 101 Fed. 171, 178.

In this case the Court reviews a large number of cases, which fully support the doctrine announced by it.

In *Chapman v. Barney,* 129 U. S. 677, one of the assignments of error was that: "The Court erred in per-" mitting a new sole plaintiff to be substituted for and " in the place of the sole original plaintiff." The Supreme Court overruled the assignment, holding that no error could be predicated thereupon.

The case of *Lusk's Administrators v. Kimball,* 91 Fed. 845, is cited by counsel for plaintiff in error in this connection. The case is erroneously cited for *Hodges et al. v. Kimball et al.* But, that case does not sustain their contention; on the contrary, it squarely upholds the doctrine of *McDonald v. Nebraska, supra.* In the *Hodges* case the Court held that, where an action was begun by a foreign administrator, without having taken out ancillary letters of administration, it was reversible error for the trial Court to have refused to permit an amendment to show his subsequent qualification by taking out ancillary letters.

And in *Person v. Fidelity & Casualty Co.* (C. C. A. 6th Circuit), 92 Fed. 965, the *Hodges* case was cited by the appellate Court, in support of its ruling, that it was error for the trial Court to have refused to allow an amendment, substituting a duly qualified administrator as plaintiff, in an action begun by another party, as administrator, who had never been appointed such.

Elliott v. Teal, 5 Sawy. 8 Fed. Cas. No. 4389, cited by plaintiff in error, simply holds that, under the provisions of the Oregon Code, where the real party in interest at the time of the commencement of the action, thereafter transfers his interest in the action, he may, notwithstanding such transfer, prosecute the action to final judgment. This case is, obviously, not in point to the question here under discussion.

In view of the rule obtaining in the Federal Courts, it is unnecessary to discuss the other State cases cited by plaintiff in error in this connection.

Under the rule in the Federal Courts, it would, therefore, not have been error for the trial Court to have allowed Shaw to have been substituted as the sole party plaintiff (assuming that Stewart had no interest in the causes of action sued on at the time of the filing of the original complaint).

(b) But, counsel say, even conceding that it would have been proper for the trial Court to have *substituted* Shaw for Stewart as the sole party plaintiff (assuming that Stewart had no interest in the causes of action at the time of the filing of the original complaint), still, it was error for the trial Court to have allowed the *joinder* of Shaw as a co-plaintiff with Stewart.

But, if the action of the trial Court in this respect was erroneous, we submit the error was harmless.

> "*It is unnecessary to cite authorities* to the proposition that, in order to promote justice, a Court may, in its discretion, permit amendment at any time before or during trial * * *."
>
> *Hoogendorn v. Daniel,* 178 Fed. 765, 767, Appeal from the District Court of Alaska.

It is the doctrine of the Federal, as well as of the State Courts, that

> "the elementary rule is that amendments are within the sound discretion of the trial Court, and are not susceptible of review on error, *except for a clear abuse.*" *Royal Ins. Co. v. Miller,* 199 U. S. 353, 369, citing *Gormley v. Bunyan,* 138 U. S. 623.

The fact that an unnecessary and improper party is joined with a proper party plaintiff cannot prejudice

the rights of the defendant in the action, for the reason that any judgment necessarily protects the defendant from any further suits upon the cause of action involved. It is, therefore, held that the joinder in a complaint of an unnecessary and improper party plaintiff is harmless error, even where the statute, governing the joinder, *provides that every action must be prosecuted in the name of the real party in interest.* See,

> *St. Louis I. M. & S. Ry. Co. v. Phillips,* (C. C. A. 8th Circuit) 66 Fed. 35.

Besides, error in *overruling a demurrer for misjoinder of parties plaintiff* is harmless and will not justify a reversal. See,

> *Daley v. Ruddell,* 137 Cal. 671;
> *Woollacott v. Meekin,* 151 Cal. 701;
> *Telegraph Co. v. Neel,* (Tex.) 35 S. W. 29;
> *Balfour Quarry Co. v. West Const. Co.,* (N. C.) 66 S. E. 217.

In *Carter v. Wilmington & W. R. R. Co.,* (N. C.) 36 S. E. 14, the State was joined as a party plaintiff in an action by citizens to recover *statutory penalties.* A demurrer for misjoinder of parties plaintiff, upon the ground that the State was an improper party, was overruled. The appellate Court said:

> "If the defendant is liable for the penalty, it makes no difference who gets it, as long as its liability is in no way increased."

And, therefore, the Court held the error of the trial Court in overruling the demurrer for misjoinder was harmless.

We submit, upon this branch of the case, that, in the first place, the amended complaint shows that both Shaw and Stewart, at the time of the commencement of the action, had an interest in the recovery sought by the action and that, therefore, the allowance of the amendment, joining Shaw as a co-plaintiff, was proper; and, in the second place, assuming that the amended complaint shows that, at the time that the original complaint was filed, Stewart had, by the assignment, transferred all of his interest in the causes of action to Shaw, nevertheless, the action of the trial Court in permitting Shaw to be joined with Stewart as a co-plaintiff, if error, was harmless and cannot justify a reversal.

THIRD: THE SEVERAL CAUSES OF ACTION WERE PROPERLY JOINED; BUT, EVEN IF THERE WAS A MISJOINDER, THERE IS NO GROUND FOR REVERSAL.

1 *Several separate causes of action to recover statutory penalties may be joined in one complaint under Sec. 84 of the Code of Civil Procedure of Alaska.*

Sec. 84 provides that

> "the plaintiff may unite several causes of action in the same complaint when they all arise out of First. Contract, express or implied; or * * * Third. Injuries, with or without force, to property * * * "

It is clear that the joinder in one complaint of several causes of action to recover statutory penalties is authorized both under the first and third subdivisions of this section.

(a) A cause of action to recover a statutory penalty is an action upon a contract implied in law and, therefore, several of such causes of action may be joined in one complaint.

The statute of Alaska provides, as do the statutes of most of the code States, that causes of action arising out of "contract express or implied" may be joined in one complaint.

When a person becomes liable, under a statute, to pay a penalty, the law implies a promise upon his part to discharge the obligation. There is, therefore, in such a case, a contract *implied in law,* on the part of the party liable, and for this reason it is held that assumpsit will lie to recover the penalty.

> *Mayor of Baltimore v. Howard,* 6 Harr. & J. 394;
> *Hillsborough v. Londonderry,* 43 N. H. 453;
> *Bath v. Freeport,* 5 Mass. 325.

The term "implied contract" as used in the statute, is to be given the meaning which it had at common law, and includes not only contract implied in fact, but also contract *implied in law.* See,

> *Bliss on Code Pleading,* 2nd Ed. Sec. 128.

Where money is paid under a mistake of fact, the obligation of the person receiving such money to repay it to the person from whom it is received constitutes a contract *implied in law;* and an action to recover money paid under a mistake of fact is based on "implied contract" within the meaning of that term as used in

statutes providing for the joinder of causes of action arising out of "contract express or implied". See,

Olmstead v. Dauphiny, 104 Cal. 635.

In *State of Nevada v. Y. J. S. Mining Company,* 14 Nev. 220, 250, cited and relied on by plaintiff in error, Chief Justice Beatty, in a dissenting opinion, demonstrates that, under the provision of the codes of the various States, permitting the joinder of causes of action arising out of "implied contract", the joinder of causes of action arising out of contracts *implied in law,* as well as those arising out of contracts implied in fact, is authorized, and that it is proper to join, in one complaint, several causes of action to recover statutory obligations, because such actions arise out of contract *implied in law.*

In North Carolina the statute provides that a plaintiff may unite in the same complaint several causes of action, where they all arise out of "contract express or implied". It was held that, under such a statute, a party may joint in one complaint several separate causes of action for different statutory penalties, because such causes of action are *"ex contractu".* See,

Katzenstein v. R. R. Co., 84 N. C. 688;

Maggett v. Roberts et al., (N. C.) 12 S. E. 890.

In volume 23 of *Cyc.,* at page 408, the author, speaking of the joinder of causes of action under the codes, says:

> "Actions for the recovery of statutory penalties are usually regarded as upon contract * * *. An action based upon a duty imposed by statute is regarded as upon contract * * *."

It is submitted, therefore, that, as causes of action to recover statutory penalties arise out of contract, *implied in law,* several of such causes of action may be joined in one complaint under the first subdivision of Section 84 of the Code of Civil Procedure of Alaska, providing for the joinder of causes of action arising out of "contract express or *implied*".

(b) The several causes of action were properly joined in one complaint under the third subdivision of Section 84, for each of such actions arose out of an injury to property.

Although the plaintiff Stewart voluntarily paid to the Bank the usurious interest, nevertheless, the Bank had no right to retain it, and by retaining it, the Bank wrongfully converted property of Stewart. Such conversion constituted an injury to the plaintiff's property, for such injury, the Alaska statute gave to plaintiff a cause of action, and under the third subdivision of Section 84, several of such causes of action could be joined in one complaint.

In the case of *Railroad Company v. Cook,* 37 Ohio State Reports 265, a statute of Ohio provided that a penalty should be imposed upon railroad companies, in favor of the party aggrieved, for overcharging for the transportation of passengers or property. The Ohio Code provided that several causes of action might be joined in the same petition, "when they are included " in either one of the following classes; * * * 3. In- " juries, with or without force, to person or *property* " or either". The Supreme Court, in holding that,

under the Code a plaintiff might unite in one petition several causes of action to recover penalties incurred under the said penal statute, said:

> "There is no doubt that this section should be construed liberally for the purpose of preventing multiplicity of actions, and we are inclined, under this rule of construction, to hold that the causes of action in the petition are for *injuries to property;* and if this be so the joinder was proper. The wrongful taking of another's property is an injury to the property. Wrongfully demanding and receiving the plaintiff's money for fare in excess of the amount authorized by law, *was an injury to her in her property.* Although it was paid without protest, the Company acquired no right to retain it. It being unlawful to demand or receive it, the railroad company unlawfully exacted and *converted* it; for this wrong and injury, the statute gave the plaintiff a right of action; and our best judgment is that *several causes of action for such injuries may be united in the same petition.*"

This case was followed in *Snow v. Mast,* 65 Fed. 995, where it was held that several causes of action for statutory penalties might be joined, both at common law and under a code provision, permitting the joinder of causes of action for injuries to property.

It is submitted, therefore, that, under both the first and third subdivisions of Section 84 of the Alaska Code of Civil Procedure, it was entirely proper for the plaintiffs to have united in one complaint several causes of action for the recovery of the statutory penalties, for which the defendant was liable under Section 257 of the Civil Code of Alaska.

2. *The cases, cited by plaintiff in error, in support of the proposition that several causes of action, to recover statutory penalties, cannot be joined in one complaint under the first subdivision of Section 84 of the Alaska Code of Civil Procedure, are either distinguishable or are of doubtful authority.*

In the case of *People v. Koster*, 97 N. Y. Supp. 829, it was held that, as the statute *expressly* provided for the joinder of causes of action for penalties incurred under the "Fisheries, Game and Forest Law", the joinder of causes of action for penalties under the "*Agricultural* Law" was excluded. This result was obviously reached by an application of the maxim "*expressio unius*", etc. The question, whether the joinder of several causes of action to recover penalties, might be supported under the provision of the statute permitting the joinder of several causes of action arising out of *contract,* was not considered by the Court.

In *Sullivan v. New York etc. R. R. Co.,* 19 Blatch. 388; 11 Fed. 848, it was held that an action for a statutory penalty could not be joined in one complaint with an action for *personal injuries,* for the reason that the statute, with reference to the joinder of causes of action, expressly provided, as do most similar statutes, that several causes of action could not be joined, unless they all belonged to a particular class enumerated in the statute; one of such classes being actions for personal injuries.

The case of *Brown v. Rice*, 51 Cal. 489, holds that several causes of action to recover statutory penalties,

which were united in the complaint in that case, were improperly joined; but, it is submitted, this case is not valuable as authority for the reason that the Court therein, *without stating any reason whatsoever for its decision,* simply said "that the several causes of action " found in the complaint, though separately stated, " were improperly united"; and also because of the fact that the later case of *Olmstead v. Dauphiny,* 104 Cal. 635, *supra,* is directly opposed, in principle, to the Brown case.

The ruling of the Court in the case of *Louisville & Nashville R. R. Co. v. Commonwealth,* 102 Ky. 330; 43 S. W. 458, and cited by plaintiff in error on page 14 of its brief, is *dictum* pure and simple, for the Court *expressly stated* in its opinion that *it was not necessary* to determine whether or not there was a misjoinder of causes of action, in view of the fact that another question, already considered by the Court, disposed of the appeal.

The Supreme Court of Nevada, in *State v. The Yellow Jacket Silver Mining Company,* 14 Nev. 220, held that several actions to recover statutory penalties or other statutory obligations could not be united in one complaint under a statute, permitting the joinder of causes of action arising out of contract express or implied. The opinion of the Court was delivered by Leonard, J., one other Judge concurring, while Chief Justice Beatty delivered a vigorous dissenting opinion, to which we have hereinbefore referred.

On page 14 of their brief, counsel cite the following from page 281 of 16 Enc. of P. & P.:

> "In Code states * * * the joinder of distinct causes in penal actions is frequently prohibited either in terms or by implication."

This quotation does not require particular comment, for the cases cited in its support are those cited by counsel, besides the case of *Carrier v. Bernstein,* 104 Iowa 572. This case wholly fails to support the text; it decides that two separate actions for penalties cannot be joined in one complaint, where such actions are brought by a single plaintiff *acting in different capacities.*

In *McCoun v. R. T. Co.,* 50 N. Y. 176, erroneously cited by plaintiff in error for the case of *McCoun v. N. Y. C. & H. R. R. Co.*, the first question, upon which the Court was asked to pass, was whether a summons, issued upon a complaint in an action to recover a statutory penalty, was regularly issued under a section of the Code providing for the issuance of summons in actions "arising on contract"; but, the Court held that, whether or not such summons was regularly issued under such section of the Code was immaterial, because the defendant could not have been prejudiced in any event. Anything in the opinion, tending to support *counsel's* position, was mere *dictum.* Besides, the code section involved did not, by its terms, apply to contract "express *or implied*", but to "contract" *unqualified.* It is clear, therefore, that what is said in the opinion is not even *dictum* supporting the proposition that an

action to recover a statutory penalty is not an action upon an implied contract.

3. *Even assuming, however, that several causes of action were improperly joined in the complaint, nevertheless, because of the failure of the demurrer to distinctly specify the grounds of objection, the trial Court did not err in overruling the demurrer for misjoinder of causes of action.*

The only error of the trial Court, assigned by plaintiff in error, with reference to the question of misjoinder of causes of action, was the order in overruling defendant's demurrer for misjoinder.

The fifth subdivision of Section 58 of the Alaska Code of Civil Procedure provides that the defendant may demur to the complaint when it appears upon the face thereof "that several causes of action have been improperly united". And Section 59 provides:

> "The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so it may be disregarded * * *."

In demurring to both the original and amended complaints, the plaintiff in error simply followed the language of the statute, stating "that several causes of " action have been improperly united" (Tr. pp. 9, 35). The demurrer failed to specify wherein there was misjoinder of causes of action, and it was, therefore, properly disregarded and overruled. It is uniformly held that, where the Code prescribes, as a ground of demurrer, misjoinder of causes of action or misjoinder of

parties, and also provides that the demurrer shall distinctly specify the grounds of objection, it is not sufficient for the demurrer to merely follow the language of the statute, but it must specify wherein the misjoinder consists; otherwise it must be overruled. See,

O'Callaghan v. Bode, 84 Cal. 489;
Healy v. Visalia & T. R. R. Co., 101 Cal. 585;
Irwine v. Wood, 7 Colo. 477;
Owen v. Oviatt, 4 Utah 95;
State v. Metschan, (Ore.) 46 Pac. 791.

In *Healy v. Visalia etc. R. R. Co., supra,* the Supreme Court of California said:

> "A demurrer to a complaint upon the ground that several causes of action have been improperly united should specify the several causes of action. *It is not sufficient to merely state that several causes of action have been improperly united in the complaint, without* at the same time pointing out those to which the demurrer is intended to refer" (101 Cal. at page 593).

In *State v. Metschan, supra,* it is said by the Supreme Court of Oregon that a demurrer in the language of the statute is insufficient, and *"the question is not raised by the demurrer"*.

4. *By answering the amended complaint the plaintiff in error waived the objection, that there was a misjoinder of causes of action in the amended complaint.*

Even if we assume, however, that there was a misjoinder of causes of action; that the defendant's demurrer, based upon that ground, was in proper form, and

that, therefore, the trial Court erred in overruling it, still, there could not be a reversal on account of such error, because, after the demurrer had been overruled, defendant answered and, by doing so, waived any error which it might otherwise have predicated upon the order overruling the demurrer.

The courts of Oregon, in considering the provisions of the Codes of that State relating to the subject of demurrers, have held, following the rule of the Federal Courts (*Campbell v. Wilcox,* 10 Wall. 421; *Marshall v. Vicksburg,* 15 Wall. 146), that, by answering over, a defendant waives any error of the trial Court in overruling a demurrer to the complaint, except, perhaps, when the demurrer goes to the jurisdiction of the Court, or to the sufficiency of the facts.

> *Richards v. Fanning,* 5 Ore. 356;
> *Olds v. Cary,* 13 Ore. 362;
> *Drake v. Swortz,* 24 Ore. 198, 201;
> *Byers v. Ferguson,* (Ore.) 68 Pac. 5.

The provisions of the Alaska Code, upon the subject of demurrers, are identical with those of the Oregon Code upon the same subject, and, as counsel say (Brief, p. 27), "the interpretation put upon the Oregon Codes " and Statutes by the Courts of that State will be fol- " lowed by this Court in dealing with the provisions of " the Alaskan Code which are taken bodily from the " Codes of that State".

FOURTH: THE COURT BELOW DID NOT ERR IN OVERRULING THE GENERAL DEMURRER TO THE AMENDED COMPLAINT.

Counsel assign, as ground for reversal, the order of the trial Court in overruling the general demurrer to the amended complaint, and contend that said demurrer should have been sustained, first, because there was no allegation in the amended complaint that the Bank received the usurious interest with knowledge that the taking thereof was illegal, and, second, because there was a misjoinder of parties plaintiff in the said complaint.

1. *It was unnecessary to allege that the Bank received the usurious interest, knowing that the taking thereof was illegal, in order to state a cause of action based upon Section 257 of the Civil Code of Alaska.*

In support of their contention counsel cite the case of *Garfunkle v. Bank of Charlestown*, 79 N. C. 404, in which, they say, it was held that a complaint to recover usurious interest under Section 5198 of the Revised Statutes of the United States should allege that the usurious interest was "knowingly received". The case cited is, however, wholly inapplicable to the case at bar. The Garfunkle case involved an action to recover usurious interest under Section 5198 of the Revised Statutes. which provides *in express terms* that, in order for a penalty to attach to the receiving of usurious interest by a National Bank, *the taking thereof must be "knowingly done";* therefore, knowledge is an essential element of a cause of action against a National Bank

under the statute. Section 257 of the Civil Code of Alaska, upon which the complaint in the case at bar is based, does not, however, make knowledge an element of the cause of action, but provides, *without* qualification, that, if usurious interest "shall hereafter *be received or collected*", the person receiving the same shall be liable. It is manifest that Section 257 does not make the liability of the person receiving the usurious interest at all dependent upon whether such interest is received with knowledge that the receiving thereof is illegal. Under the Alaska statute knowledge is a wholly immaterial factor in the determination of liability; for it is well settled that, where a statute provides for a penalty for the doing of an act and does not, *in terms,* make liability conditional upon knowledge of the illegality of such act, liability for the penalty will attach *even in the absence of such knowledge.* See,

> *United States v. Thomasson,* 28 Fed. Cas. No. 16478;
>
> *Quimby v. Waters,* 28 N. J. L. 533;
>
> *Monroe Dairy Assn. v. Stanley,* 20 N. Y. Supp. 19.

Knowledge of the illegality of the taking of the usurious interest was not a condition precedent to liability for the penalty provided by the Alaska statute, and it was, therefore, of course, unnecessary for the plaintiff to have alleged such knowledge.

2. *But, even if it had been necessary, in order to have stated a cause of action under the Alaska statute, to have alleged knowledge on the part of the defendant Bank of the illegality of the transaction, the amended complaint was sufficient in this respect as against a general demurrer.*

It is alleged in each of the counts of the amended complaint that the interest paid by Stewart to the Bank was in excess of the amount allowed by law, "and the " receiving and collecting thereof was illegal and in " contravention of" the Alaska statute, and that "the " charging, collecting and receiving of said interest was " done by said defendant in the District of Alaska and " *with full knowledge that the same was illegal and* " *wrongful*".

This allegation, as to the knowledge of the defendant that the taking of the said interest was illegal and wrongful, is entirely sufficient as against a *general demurrer.*

It is well settled, both at common law and under the Codes, that an averment of a material fact by way of recital, while perhaps bad *in form*, is entirely sufficient as against a *general demurrer.* See,

> *Chitty on Pleading,* p. 302;
> *Fuller Desk Co. v. McDade,* 113 Cal. 360;
> *Santa Barbara v. Eldred,* 108 Cal. 294;
> *Bank v. Angell,* (R. I.) 29 Atl. 500.

Even if, therefore, an allegation of knowledge on the part of the Bank of the illegality of the transaction was essential to the statement of a cause of action against

it, the allegation in the amended complaint of the Bank's knowledge was entirely sufficient as against its general demurrer.

3. *No error can be predicated upon the action of the trial Court in overruling the general demurrer, even if it be assumed that it appeared on the face of the amended complaint that there was therein a misjoinder of parties plaintiff.*

In support of their contention that it was error for the trial Court to have overruled the general demurrer (assuming, of course, that there was a misjoinder of parties plaintiff apparent on the face of the complaint) counsel cite the case of *Cohn v. Ottenheimer,* 13 Ore. 225, saying that, in that case, it was held that, where a statute, such as that of Oregon, which is similar to the Alaska statute, does not provide for demurrer upon the specific ground of misjoinder of parties, the question of such misjoinder may be raised by general demurrer.

There is a marked conflict in the decisions of the various Courts upon this question, and many cases might be cited in support of the proposition that, where the Code does not provide for a demurrer upon the ground of misjoinder of parties, an objection upon that ground cannot be raised by general demurrer. But, even in those cases in which it is held that the question of misjoinder of plaintiffs may be so raised, it is *further* held that the demurrer must specify the plaintiff in favor of whom it is claimed no cause of action is stated; for, if the demurrer is general, stating simply, as is the case here, that the complaint "does not

"state facts sufficient to constitute a cause of action", without specifying the plaintiff, in favor of whom it is claimed no cause of action is stated, the demurrer must be overruled, if the complaint states a cause of action *in favor of any one of the plaintiffs.*

> "The demurrer upon the *general ground that the complaint does not state facts sufficient to constitute a cause of action,* was properly overruled, because a general demurrer is not sustainable if the complaint states a cause of action in favor of *any one* of several plaintiffs."
>
> *O'Callaghan v. Bode,* 84 Cal. 489, 495.

> "If, therefore, a cause of action is set out in favor of any party plaintiff the (general) demurrer * * * must be overruled."
>
> *Nevil v. Clifford,* 55 Wis. 161.

It follows, therefore, that, as the amended complaint concededly stated a cause of action in favor of at least one of the plaintiffs, the general demurrer was properly overruled.

FIFTH: THE TRIAL COURT DID NOT ERR IN STRIKING FROM THE FILES THE ANSWER OF THE DEFENDANT TO THE AMENDED COMPLAINT.

1. *Assuming that defendant's answer to plaintiffs' amended complaint, on its face, states a good defense, nevertheless, such answer was sham and frivolous and, therefore, was properly stricken from the files under Section 66 of the Alaska Code of Civil Procedure.*

Section 66 provides, as do the codes of most of the States, that "sham, frivolous and irrelevant answers " and defenses may be stricken out on motion", etc. And an answer is sham when, although good in form, it is not pleaded in good faith. See,

Piercy v. Sabin, 10 Cal. 22;
Gostorfs v. Taaffe, 18 Cal. 385;
Greenbaum v. Turrill, 57 Cal. 285;
Association v. Boggess, 145 Cal. 30.

It is apparent from the *pleadings* that defendant's answer was sham and it was, therefore, properly stricken out on motion of plaintiffs.

In its answer to the original complaint defendant alleged that, before the commencement of the action, Stewart had assigned to Shaw the causes of action sued on; that answer was *verified by the cashier of the defendant Bank.* After that answer was filed, Stewart asked the Court to be permitted to amend the complaint by including Shaw as a party plaintiff, in order to meet the objection raised by defendant's answer. The amendment was allowed, and, after the amended complaint was filed, defendant filed its answer averring, without any reason whatsoever for its remarkable change of position, that *neither* Stewart nor Shaw had any interest in the cause of action sued upon, but that, prior to the commencement of the action, Stewart had assigned all of his interest in the causes of action to West Coast Grocery Company. This answer *was also verified by the cashier of the defendant Bank.* Neither in its answer to the original complaint, nor in its answer to the

amended complaint, did the defendant even attempt to plead any defense *on the merits;* the only defense set up in each answer was that the action was not brought by the real party in interest. In its answer to the amended complaint the defendant, therefore, averred, under oath, that the verified averments in its answer to the original complaint were *untrue;* and it made no pretense of pleading in its second answer any fact, or circumstance whatsoever, having even a tendency to remove the bad faith, with which it had thus charged itself.

Manifestly, the answer to the amended complaint was not interposed in good faith, and it was apparent that the defendant, by trifling with the Court, was endeavoring to delay recovery upon causes of action to which, concededly, it had no defense.

Under these circumstances, we submit, that the trial Court properly exercised the discretion vested in it, under Section 66 of the Code of Civil Procedure of Alaska, in striking from the files defendant's answer.

2. *The action of the Court in striking out defendant's answer may also be sustained upon the ground that the answer contains no averment whatever of any fact which would be a defense to the causes of action set forth in the amended complaint.*

Stripped of unnecessary verbiage, the averments of defendant's answer are, solely, that neither of the plaintiffs has any interest in the said causes of action, but that the West Coast Grocery Company alone is the real party in interest; that the said West Coast Grocery

Company is prosecuting the suit in the name of the plaintiffs; has employed the attorney for the plaintiffs, at its own expense, and has advanced all necessary costs and expenses for the prosecution thereof.

In *Giselman v. Starr*, 106 Cal. 651, the Supreme Court of California, in considering the rights of a defendant to insist upon an action being prosecuted in the name of the real party in interest, said that where it appeared

> "that a judgment upon it (the cause of action) satisfied by defendant would protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defense he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested the action is being prosecuted in the name of the real party in interest."

In *Sturgis v. Baker*, 43 Ore. 236; 72 Pac. 746, *supra*, Judge Wolverton, speaking for the Supreme Court of Oregon, said:

> "The statute requiring that every action shall be prosecuted in the name of the real party in interest (B. and C. Comp., Sec. 27) was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But if not cut off from any just set-off or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end."

To the same effect are

Price v. Dunlap, 5 Cal. 483;

Gushee v. Leavitt, 5 Cal. 160;

Los Robles Water Co. v. Stoneman, 146 Cal. 203.

Tested by the foregoing rule, it is perfectly clear that defendant's answer to the amended complaint constituted no defense to the action.

In its said answer defendant *wholly failed to allege any fact* to show that, because the action was not prosecuted in the name of the West Coast Grocery Company, it was deprived of the right to urge any defense which it might have had against the Grocery Company.

Besides, the averments in the answer, that the West Coast Grocery Company *is prosecuting the action and conducting the litigation in the name of the plaintiffs,* are entirely sufficient to show that the said company would be bound by any judgment rendered in the action, and which would also be a complete protection to the Bank from any further suits on the same cause of action.

> "One who institutes and conducts a litigation in another's name is estopped by the decision or judgment therein from again contesting the same issues with his adversary, or those in privity with him, as completely as the party in whose name he carries on the controversy. Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129; Tootle v. Coleman, (C. C. A.) 107 Fed. 41."

James v. Germania Iron Co., (C. C. A. 8th Circuit) 107 Fed. 597, 613.

In *Cramer v. Manufacturing Company,* (C. C. A. 9th Circuit) 93 Fed. 636, 637, this Court said:

> "In so holding the Circuit Court applied the well settled rule that one who, for his own interests, assumes the defense of an action, is bound by the judgment as if he had been a party thereto or in privity with the defendants."

To the same effect are

Lane v. Welds, (C. C. A. 6th Circuit) 99 Fed. 286;

Theller v. Hershey, 89 Fed. 575;

Greenwich Ins. Co. v. N. & M. Friedman Co., 142 Fed. 944.

It is clear, therefore, that the West Coast Grocery Company, even if it was the real party in interest, is bound by the judgment rendered in this action; and, as the answer does not disclose that the defendant has any defense to the action as against the West Coast Grocery Company, which it could not urge against the plaintiffs, and, as it further *affirmatively appears* from the answer that any judgment rendered in the action would be binding on West Coast Grocery Company, assuming that it is the real party in interest, and would protect defendant from any further suits upon the same cause of action, it necessarily follows that the amended answer failed to state any defense to the causes of action set up in the amended complaint.

The trial Court, under these circumstances, properly struck out the answer, upon the ground that the same was "irrelevant" under Section 66 of the Alaska Code of Civil Procedure.

SIXTH: THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE OUT THE AFFIDAVIT OF STEWART, FILED WITH THE NOTICE OF MOTION TO STRIKE OUT DEFENDANT'S ANSWER.

In subdivision VII of their brief, counsel argue that the Court below erred in refusing to strike out the affi-

davit of Stewart, which was filed with plaintiff's motion to strike out the answer. This argument is based upon assumption that the affidavit was used upon the hearing of the motion and was considered by the trial Court in passing upon it.

1. The record, however, wholly fails to show, either that the affidavit was used upon the hearing of the motion, or that it was considered by the trial Court. Of course, unless the affidavit was considered by the Court below in passing upon the motion, it is of no moment whether it was improper for the plaintiff to have filed it, or whether it was error for the trial Court to have refused to have stricken it out after it was filed.

Waiving, because of the stipulation of counsel found on page 72 of the Transcript, the objection that neither the affidavit nor the refusal of the trial Court to strike it out can be considered by this Court for the reason that it is not embodied in a bill of exceptions, we still insist that no error can be assigned upon the refusal of the trial Court to strike out the affidavit, for the reason that the *record wholly fails to show*, either by stipulation of the parties, or by bill of exceptions, or otherwise, that the affidavit was ever *used before the trial Court*, or considered by it in passing upon the motion

It is elementary that an assignment of error, based upon evidence contained in the record, but

> "not embodied in a bill of exceptions, or otherwise authenticated *as having been used before the Court below* * * * cannot * * * be considered here."

See,

Lee Won Jeong v. United States, (C. C. A. 9th Circuit) 145 Fed. 512, 513;

Carr v. Fife, 156 U. S. 494.

2. In any event, it is clear that the Court below did not err in refusing to strike out the affidavit. The only statement in the affidavit which could, upon any theory, be complained of, is that "said answer is false in each " and every particular, save the allegation of my in- " solvency". In its motion to strike out, however, defendant did not ask to have that statement stricken out, but moved to strike out the affidavit *as a whole* and, as the statements in the affidavit, other than that particular allegation, are, concededly, unobjectionable, no error could have been committed by the trial Court in denying the motion; for

> "motion is properly denied where it is too broad in its scope and cannot be sustained as an entirety".
>
> *31 Cyc.* 663.

3. Assuming, however, that the record did show that the affidavit of Stewart was used before the trial Court, and assuming also that it should have been stricken out, still, we submit, it affirmatively appears that any error committed by the Court below, in refusing to strike out the affidavit, was harmless.

As we have hereinbefore shown, it appears *from the record itself,* that defendant's answer was sham and frivolous, and it further appears that the answer was

wholly irrelevant, as it contained no averments constituting any defense to the action. Upon *these* grounds, the answer was properly stricken out. The action of the trial Court in striking out defendant's answer can, therefore, be supported upon grounds other than, and entirely independent of, any statements in Stewart's affidavit. The result upon the motion to strike out the answer would have been the same with or without the affidavit. It is clear, therefore, that any error in refusing to strike out the affidavit, even if the trial Court considered the same in passing upon the motion, was immaterial and harmless.

> "Evidence, improperly admitted, in a case tried before a *Court* must be of such kind and so forceful that it should work a different result from that arrived at by the trial Court"; otherwise the admission thereof is harmless.
>
> *Streeter v. Sanitary District,* (C. C. A. 7th Circuit) 133 Fed. 124, 131.

SEVENTH: THE TRIAL COURT DID NOT ERR IN ORDERING JUDGMENT TO BE ENTERED AGAINST THE BANK IN FAVOR OF BOTH PLAINTIFFS. IF IT WAS ERROR IT WAS HARMLESS.

It is contended by plaintiff in error that, if the causes of action sued on were assignable, then Stewart had no interest in the judgment, while, if the said causes of action were not assignable, then Shaw had no interest in the judgment, and that, therefore, they could not both be entitled to judgment.

We have already shown, however, that, even assuming that the causes of action were assignable as contended by counsel, still the allegations of the amended complaint show that both Stewart and Shaw had an interest in the causes of action and that, therefore, both of them were proper parties plaintiff. If this be so, then, of course, it was proper for the Court to have ordered judgment in favor of both of them.

But, assuming that the contention of counsel, that it appears from the amended complaint that the whole interest in the causes of action sued on was either in Stewart or in Shaw, is sound, nevertheless, any error committed by the trial Court, in ordering judgment in favor of both of the plaintiffs, would be entirely harmless; for, as we have hereinbefore shown at some length, the payment by the Bank, of the judgment rendered against it, will fully protect it against any further suits upon the causes of action, whether the title to the causes of action was in Stewart, or in Shaw, or in both of them. The Bank, therefore, is in no position to complain.

For the reasons herein stated, it is respectfully submitted that the record does not disclose the commission of any error by the Court below; and, also, that should any action of the Court below complained of by the plaintiff in error, be considered error, it was harmless and without prejudice to the rights of the plaintiff in error, and that the judgment should, therefore, be affirmed.

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